

gave them to her. Tr. 2346. The Bureau did not produce the originals of the documents bearing Pfeifer's signature, and it further appears that the copies in the record did not come from the Bureau's files. None of the documents bears an FCC date receipt stamp, and most of the documents discussed above are labeled across the top with the words "Carla Attachment" and a number. The Bureau does not know whether these are copies of documents from the FCC files or copies of documents which Ms. Pfeifer herself provided to Bureau investigators. Tr. 2334.

(6) Oat Trunking Group, Inc.

131. Oat Trunking Group, Inc. (OTG) is a corporation of which Kay is the President and sole shareholder. Tr. 862-863. OTG has never had any payrolled employees. Tr. 863, 1267. WTB Ex. 312 is an application in the name of OTG for a community repeater base station together with 29 mobile units. Kay explained the purpose of the application as follows:

I was going to use it to hold a license for a community repeater and have my corporation share use of that station with other users in accordance with the sharing rules of the FCC, so that's perfectly permissible. I can also have Buddy Corporation employees use the station. Sister corporations with the same management can share stations with each other. There was nothing extraordinary or abnormal about it, sir.

Tr. 1267-1268.

132. The application is signed by Vincent Cordaro who was at that time an officer of OTG. Tr. 863. Asked why Cordaro, rather than Kay, had signed the application, Kay explained:

I don't recall the precise reasons. If I were to make a best estimate, it's because at that time I was trying to get Mr. Cordaro more involved in the operations of my company to possibly even become an owner in my company. This was dated I think that's 6-8-92. That would be just after he became the general manager of my company, and he wanted to be more involved and possibly become an owner of the company. Since that didn't work out for him is I think one of the reasons he ultimately left my employ. He wanted more than just to be an employee.

Tr. 1268-1269. Kay's association with OTG was never concealed from the Commission. He is listed as the application preparer on the FCC Form 574 in WTB Ex. 312. Another application filed in the name of OTG at approximately the same time sought to convert an existing conventional station to a community repeater. WTB Ex. 311. That application was also signed by Cordaro and also lists Kay as the preparer. *Id.* at p. 2, item 37. It also conspicuously identifies Kay as the licensee of an associated SMR facility. *Id.* p 2, item 38. The transmittal letter covering the application, moreover, is signed by Kay and very clearly explains Kay's involvement in the proposal. *Id.* at p. 1.

### Interference Issue

133. In May 1992, Paul Oei, an electronics engineer employed in the Commission's Los Angeles field office, Tr. 1345, 1360-1361, accompanied another FCC employee, Mr. Ben Nakamiyo, on an investigation of an interference complaint against Kay. Tr. 1352-1353. Nakamiyo, not Oei, was the FCC official responsible for the investigation, and Oei was along on the trip as part of his training. Tr. 1361-1362. Jim Doering, another Los Angeles SMR operator and a competitor of Kay, had complained that Kay was rebroadcasting one or more signals from one frequency onto another from his Van Nuys office location. Tr. 1353. Doering complained that these retransmissions were causing interference to a facility licensed to him on the frequency 854.4875 at Santiago Peak. Tr. 1370.

134. Nakamiyo and Oei visited Kay's office location at Van Nuys and asked to inspect a control station there. Tr. 1353. Oei testified that a control station normally has a microphone attached to it, but that in this case the control station has a wire or cable connected where the microphone normally would have been. Tr. 1354. Oei testified that Nakamiyo's notes indicated that Kay removed the cable and replaced it with a microphone during the inspection, although Oei himself does not recall observing this. Tr. 1363. Either Nakamiyo or Oei took power measurements from the control station, and Oei took down notes. Tr. 1363.

135. The repeater channel in question that was the subject of the interference complaint was the frequency pair 809.4875 MHz and 854.4875 MHz. The frequency 809.4875 MHz is known as the "input," i.e., the frequency on which mobiles and control stations transmit into the repeater and on which the repeater receives their transmissions. The frequency 854.4875 MHz is known as the "output," i.e., the frequency on which the repeater re-transmits the signal it receives and the frequency on which mobiles and control stations receive the repeater transmissions. Oei and Nakamiyo monitored the allegedly interfering signal simultaneously on the input and output frequencies, and used direction finding techniques to determine that the transmissions on the input frequency were emanating from Kay's Van Nuys office location. Tr. 1365. Oei does not recall whether they made any attempt to determine the source of the transmissions on the output frequency, i.e., which repeater the transmissions were being sent through, Tr. 1365, 1380, and there is no indication in the record that any such determination was ever attempted.

136. During the May 1992 inspection, Kay produced a license, issued to Buddy Corp., that authorized a control station at the Van Nuys location for the purpose of controlling SMR Stations WNMY402 and WNJA910. Tr. 1367-1368. This license authorized transmissions from the fixed location at Kay's office on the input frequency of repeater channels authorized on those two call signs. Tr. 1368-1369. Station WNJA910 is authorized for the base station frequency 854.4875 MHz at Oat Mountain and was so authorized at the time of the May 1992 inspection. Tr. 1369. This is a trunked station, authorized as a "YX," and therefore has exclusive use within a 70 mile radius. Tr. 1381-1382.

137. The Oat Mountain site is less than ten miles from Kay's Van Nuys office location. Tr. 1365-1366. The Santiago site is more than 70 miles away from Oat Mountain. Tr. 1383. Oei admitted that the Buddy Corp. control station license authorized Kay to control the WNJA910 repeater (i.e., make transmissions on the repeater input frequency) from the Van Nuys location without prior monitoring because the repeater was licensed as a "YX" with exclusive use and the Van Nuys control station was within a 20 miles radius of the Oat Mountain repeater site. Tr. 1381-1382. He felt, however, that Kay's "link" configuration (in which Kay was apparently receiving transmission on the output of Station WNMY402 and retransmitting them on the input of WNJA910) was improper because he was using the link as a repeater rather than as a control station. Tr. 1381. Oei could not, however, cite a specific rule that prohibits the described configuration. Tr. 1383.

138. Kay gave testimony fully describing and explaining the station that was inspected in May 1992. It consists of four devices: a power supply, two EF Johnson 800 MHz trunked radios (Model No. 8615), and a Rayfield Easy-Link unit that connects the two radios together. Tr. 2484-2485. Kay operated the two EF Johnson radios pursuant to the Buddy Corp. control station license which authorized him to control Stations WNMY402 (Mount Lukens) and WNJA910 (Oat Mountain) from his Van Nuys office location. Both locations are less than twenty miles from Kay's Van Nuys office. Tr. 2486. The configuration takes output from the Oat Mountain repeater and retransmits it through the Mount Lukens repeater, and vice versa. Tr. 2487-2488.

139. The back-to-back linking of two radios in the configuration used by Kay is accomplished with standard, readily available equipment and in full accordance with manufacturer intentions and recommendations. Tr. 2489; Kay Exs. 44 & 45. The purpose of this is to extend the coverage or "footprint" of each repeater, thereby improving service to the end users. Tr. 2485-2488. Thus, for example, a mobile unit located in Hollywood that can not access the Oat Mountain repeater but can access the Mount Lukens repeater will, by virtue of this configuration, be able to communicate through both repeaters and thus enjoy a much larger service area. Tr. 2488. James P. Hanno, who has over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant, testified as follows:

I have also been asked to comment on the use in the land mobile industry of devices which allow the linking of remote repeater sites. I am familiar with such devices. Essentially, the device receives the output frequency of a channel on one repeater and relays it on the input frequency of a different channel on a repeater at a different location. The device may be co-located with one of the repeater sites, or it may be located at an intermediate point between the two repeaters. This is a common practice in the industry. Its purpose is to extend the communications range of the customer. Without the link, the customer can only communicate to points within the footprint of the specific repeater he is operating on. With the link, his coverage area includes the footprint of the repeater he is operating on plus the footprint of the linked repeater. Several equipment vendors offer off-the-shelf devices designed expressly for this purpose.

Kay Ex. 63 at ¶ 12.

140. Kay understands that he is obligated to avoid interference by coordinating his usage of a non-exclusive channel with other properly licensed co-channel users within a 70 mile radius. Tr. 970. Where he has exclusive use of channel, such as in the case of a licensed "YX" trunked system, however, and operates within the scope of his authorization, he does not believe he is responsible for possible interference to stations located beyond the 70 mile separation. Tr. 2490-2491. Indeed, Mr. Kay testified that Paul Oei had used the term "legal interference" to describe the situation in which two co-channel stations, both properly licensed and separated by one another by the prescribed distance, and both operating within the scope of their authorizations, may nonetheless sometimes interfere with one another. Tr. 2491. For example, Kay's Los Angeles repeater operations often experience "legal interference" from stations operating in San Diego. *Id.* Kay explained that this is simply an unavoidable consequence of the fact that "the radio signals unfortunately don't politely end at the end of your authorized service area, and oftentimes do play with the other guy's operations." *Id.*

141. Roy Jensen testified that "[t]here were a couple of circumstances that [Kay] explained to me where he claimed to have" interfered with other operators. Tr. 1467. Jensen did not observe this and could give no specific instances of his personal knowledge. Jensen acknowledged that Kay's descriptions of interference situations, schemes, and techniques were "explained to me just because of necessity, understanding customer problems." Tr. 1466. Jensen also acknowledged that there would have been legitimate business reasons for Kay to understand and discuss intentional interference techniques. "[I]f a customer complains about the interference, being able to track it down is a valuable skill." Tr. 1476.

142. Even in the one instance in which Jensen claims to have observed Kay jamming from the tech room at Lucky's, Tr. 1468-1469, Jensen stated that Kay did not hold the channel open for very long and that "[i]t was kind of a demonstration of concept type thing." Tr. 1470. Jensen claims that Kay used a service monitor to transmit on a repeater input to lock onto a repeater, but he does not know what frequency Kay was allegedly transmitting on or what repeater he allegedly locked onto. Tr. 1477-1478. Similarly, while Jensen alleges that Kay claimed to have jammed other operators, he does not know any specific repeater or company name. Tr. 1471.

#### **Effect of De Facto Control Issue** <sup>22</sup>

143. Sobel has been involved in the land mobile radio business in the Los Angeles area since approximately 1976. Tr. 1707-1708. Sobel was involved in the business before Kay, and actually is the one who introduced Kay to it. Tr. 1712. Sobel is a two-way radio dealer. He

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<sup>22</sup> This issue, as framed by Judge Sippel, was to determine "[w]hether, based upon the findings and conclusions reached in WT Docket No. 97-56 concerning Kay's participation in an unauthorized transfer of control Kay is basically qualified to be a Commission licensee." MO&O 98M-15 at p. 7.

sells and services radios, he provides repeater service, he installs and maintains, systems for users and for other dealers, and provides consulting services. Tr. 1708. Sobel first became interested in obtaining authorizations for 800 MHz facilities in the early 1990's. Tr. 1707. Prior to that time, his repeaters were operated in the UHF bands (450 MHz and 470-512 MHz). Tr. 1709.

144. Kay and Sobel have been friends for twenty years. WTB Ex. 228 at p. 71; WTB Ex. 229 at pp. 326-327. In the early 1990's, when Sobel became interested in obtaining 800 MHz repeater licenses, he approached Kay for assistance. Tr. 1712. By this time Kay had developed a repeater business that had far surpassed Sobel's in size and scope. *Id.* There were several reasons why Sobel turned to Kay for help in pursuing 800 MHz licensing. Kay already held 800 MHz licenses and was familiar with the rules and procedures which were different than for UHF applications. Also, Kay and Sobel were good friends, Sobel trusted Kay's judgment. Tr. 1712-1713.

145. Kay helped Sobel locate target frequencies to apply for, but Sobel was directly involved in the process. Sobel did not merely accept Kay's recommendations without input or question. Indeed, Sobel sometimes rejected Kay's initial suggestions based on his own information regarding the local industry and environment. For example, in at least one case he declined an initial recommendation because he would have been on the same frequency as a competitor he considered too aggressive. In other cases he determined that the existing loading on the channel by other pre-existing licensees did not permit the authorization of enough mobile units to make pursuit of the channel worthwhile. Tr. 1714.

146. Kay prepared the 800 MHz applications at Sobel's direction and on Sobel's behalf. This was primarily because Kay already had specialized software to do so. Tr. 1714-1715. It was also easier for Kay to do this because he already had the technical information for many of the sites in his computer system. Tr. 1713. Sobel sometimes prepared the applications himself using Kay's computer. Tr. 1715. Regardless of who prepared the 800 MHz applications, however, Sobel always reviewed and signed them. Tr. 1715. Kay never filed an application on behalf of Sobel that was not first reviewed, approved, and signed by Sobel. Tr. 1715-1716. It is typical in the land mobile industry for someone other than the licensee to prepare applications. Licensees rely on frequency coordinators, application preparation firms, equipment vendors, *etc.*, for the preparation of Part 90 applications, even including assistance in selection of frequencies to be applied for. Tr. 1716-1720. If Sobel had engaged the services of a frequency coordinator or an application preparation firm, the services provided would not have been significantly different than those provided by Kay. Tr. 1719.

147. Sobel's home address was used on all applications. Kay has no access to this location, and, therefore, all correspondence regarding Sobel's 800 MHz applications were directed to Sobel. Other than information that might appear on public notice, Kay would have no knowledge of Commission correspondence regarding the 800 MHz applications and licenses

except through Sobel. Tr. 1720-1721. Sobel's home address was also designated as an authorized control point on the 800 MHz licenses. Tr. 1721-1722.<sup>23</sup>

148. When Sobel began to receive grants of the 800 MHz licenses, he entered into an oral arrangement with Kay. The essence of the deal was that Sobel would install the stations using equipment Kay had in his inventory; Kay would provide repeater site space for most (but not all) of the stations; Kay would market the system (i.e., resell airtime to end users); and Sobel and Kay would split the revenues beyond the first \$600 per month per repeater (the first \$600 going to Kay to compensate him for the equipment, site rental, etc). Tr. 1723.

149. Sobel viewed this as a good business arrangement for himself on a number of scores. First, it allowed him to obtain and implement 800 MHz authorizations without having to spend the \$6,000 to \$7,000 per repeater that would otherwise have been required for the equipment, not to mention the monthly expenses. Tr. 1724. Sobel would also receive an immediate initial return in the form of the hourly rate he charged Kay for installation and maintenance services--functions that he would have performed for no compensation had he decided to pursue the 800 MHz stations independently of Kay. Tr. 1724-1725.

150. It was also advantageous to Sobel to have Kay resell airtime on the 800 MHz repeaters rather than for Sobel to have to market them on his own. Sobel's land mobile business is a one-man operation which keeps him personally occupied at least 30 to 60 hours per week, and sometimes as much as 70 hours per week. Tr. 1726-1727. Kay, by comparison, had a sales staff in place and was already actively marketing 800 MHz services. Tr. 1726.

151. While Sobel could have made the decision to construct, operate, and market the 800 MHz stations independently of Kay, he determined that the arrangement with Kay made good business sense. On his own he would have had to purchase repeater equipment (at approximately \$6,000 to \$7,000 per repeater), or lease it (at a monthly cost of \$200 to \$300 per repeater). Tr. 1727. He would also have been required to lease repeater site space. Tr. 1728. In addition, Sobel would not have received compensation for having installed and maintained the stations--thus, he would have been required to do this work himself for no compensation or contract it out, thereby incurring further expense. Tr. 1728-1729.

152. Sobel is not an absentee owner of the management agreement stations. He resides in the stations' service area and is a hands-on owner who has remained actively and fully involved in all aspects of the day to day operations. Except for matters specifically and directly related to Kay's resale of airtime, Sobel has been solely responsible for and directly involved in daily operations. Sobel constructed the facilities and he maintains them. WTB Ex. 328 at pp. 104, 107. He regularly monitors the repeaters and frequently visits the transmitter sites. WTB Ex. 328 at p. 117; Tr. 1734-1735.

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<sup>23</sup> As explained by Sobel, the control point is where you maintain control over your station. Tr. 1721-1722. See Section 90.429 of the Rules.

153. The price to be charged for repeater service is largely dictated by local industry standard, and Sobel has personally determined when to make adjustments. WTB Ex. 328 at p. 123. He has, on occasion, overruled Kay's initial determination as a reseller regarding the rates to be charged. When special deals are negotiated, Sobel either handles it or knows about it. Id. at pp. 129-130. Sobel has the right to approve or disapprove any service contracts entered into by Kay. Id. at pp. 128-129. Sobel reviews Kay's customer contracts approximately once or twice per month. Id. at p. 122. Sobel also reviews with Kay the decisions regarding which customers to place on which repeaters. Id. at p. 123.

154. Kay prepared much of the FCC and frequency coordination paperwork for the 800 MHz repeaters, subject to Sobel's supervision, review, and approval. This was a matter of convenience. Kay had a special software package that generated the appropriate forms. WTB Ex. 328 at pp. 74-75. On some occasions Sobel actually prepared the applications himself using Kay's computer. Id. at p. 74. Nothing was ever filed with the Commission on Sobel's behalf before Sobel reviewed, approved, and signed it. Tr. 1715-1716. This was more than token approval. Sobel is intimately familiar with the application forms and procedures, having prepared his own UHF repeater applications as well as many applications for his clients and customers, Tr. 1714.

155. As previously discussed, the arrangement provided that Kay would provide space to Sobel at some of the sites. At a few sites Sobel leases space from persons other than Kay, and at one site Sobel subleases space to Kay. At the other sites, Sobel either leases or subleases space from Kay. Tr. 1732. Where the space is provided by Kay for Sobel's UHF repeaters (which are otherwise entirely independent of Kay), Sobel makes monthly cash payments to Kay. Tr. 1727. Kay's provision of space for the 800 MHz repeaters, however, is included as part of the arrangement with Sobel. Tr. 1723. A typical mountain top repeater site is a small building, perhaps 1,200 to 1,500 square feet, and some even smaller, next to a tower or antenna structure. Tr. 1710. Inside the building are equipment racks and cabinets, wiring and cabling, transceivers, power supplies, etc. Tr. 1710-1711. A small building may house only about five repeaters, while a larger one may have more than 100. Tr. 1711. A given building may house multiple licensees. It is quite common in the Los Angeles land mobile radio community for multiple licensees, even competitors, to share a common repeater and antenna sites in order to realize economies of scale. Tr. 1711, 1732-1733.

156. The arrangement between Sobel and Kay is nothing more than a lease of channel capacity or airtime to Kay which Kay then resells. This is a common arrangement in the Los Angeles land mobile radio community, and one that is perfectly legal under the FCC's policies and precedents. There are several dealers in the Los Angeles area who provide repeater service to their customers without holding any licenses of their own. They do this by marketing services and/or reselling airtime on repeaters licensed to other operators. Tr. 1739-1740.

157. Consistent with the fact that Kay is operating as a reseller of airtime on Sobel's 800 MHz repeaters, the customers on Sobel's 800 MHz repeaters are Kay's (not Sobel's) customers. Sobel nonetheless remains fully aware of who are the customers. Sobel typically does the

account activations and deactivations. Tr. 1741, 1744. Sobel has unrestricted access to the customer contracts. Tr. 1741. Repeater service agreements are fairly standard, and Sobel is familiar with the structure. Tr. 1741.

158. In the fall of 1994, Sobel became aware of a draft hearing designation order in the Kay proceeding. Kay had obtained the draft through a FOIA request and he informed Sobel of it. Tr. 1751-1752. The draft HDO contained the following language.

Information available to the Commission also includes that James A. Kay, Jr. has done business under a number of assumed names. We believe that these names include some or all of the following: Air Wave Communications ... [and] Marc Sobel dba Airwave Communications.

Kay Ex. 5 at p. 2 ¶. Air Wave Communications is a name under which Marc Sobel does business. Tr. 1152-1153, 1752.

159. Sobel was surprised upon learning of this language suggesting that he was nothing more than an alias of James Kay. Tr. 1752-1754. As Sobel explained:

I was surprised, because, as you can see, I'm a real person. I'm not an alias of James Kay, clearly. My business is my business. Air Wave Communications, he has nothing to do with it. He's not a partner, he's not part of the d/b/a and it was just an absolute surprise and a little bit of anger that they should include my name in their process of the HDO against James Kay. In other words, I thought it was entirely unfair and inappropriate.

Tr. 1753. Kay Ex. 6 is a letter, dated December 6, 1994, which Sobel wrote to Gary Stanford of Bureau staff in Gettysburg. The purpose of this letter was to correct the apparent misbelief of the Commission that Sobel was a fictitious name being used by Kay rather than a real, separate individual. Tr. 1557-1559. In the letter, Sobel advised the Commission:

I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages. My business tax registration and resale tax permits go back to 1978--long before I began conducting any business whatsoever with Mr. Kay.

Kay Ex. 6 at p. 1. Sobel closed the letter with the following invitation: "Should you need further assistance ... in this matter, please call me at your earliest convenience." Id. at p. 2. Neither Stanford nor anyone else from the Commission ever responded to Sobel's letter. Tr. 1559.



160. After learning of the draft HDO, Sobel asked Brown and Schwaninger to prepare a written agreement to document the relationship between him and Kay. The purpose of drafting such a written agreement was "to clarify our separateness, our positions as two businesses, and our relationship in my station that [Kay] managed." Tr. 1761. Sobel was not in any way dissatisfied with Kay's performance under the pre-existing oral arrangement. He had no reason to distrust Kay, and he had no desire to modify the relationship. Tr. 1764. Indeed, the parties did not change their relationship after the agreement was placed in writing--the written agreement was simply intended to clarify their position on paper. Id.

161. WTB Ex. 339 is a copy of the written management agreement between Sobel and Kay as executed on October 28, 1994. Brown and Schwaninger did not provide Kay and Sobel with preliminary drafts of the agreement; rather, it was their understanding this was a standard boilerplate agreement used by Brown and Schwaninger with all their clients. Tr. 1246, 1763. In fact, Kay had been advised by Brown and Schwaninger that "the management agreements met the FCC rules on all four corners." Tr. 2445.

162. Paragraph VIII of the written management agreement expressly provides:

Supervision by Licensee: Licensee shall retain ultimate supervision and control of the operation of the Stations. Licensee shall have unlimited access to all transmitting facilities of the Station, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with FCC Rules and shall be able to direct any control point operator employed by Agent to discontinue any and all transmissions which are not in compliance with FCC Rules. All contracts entered into with end users of the Stations' services shall be presented to the Licensee, either by original proposed contract or copy thereof, before such contracts go into effect, and Licensee shall have the right to reject any such contract within five (5) days of presentation, however, such rejection shall be reasonable and based on the mutual interests of the parties. Licensee shall have the right to locate the Stations' transmitting facilities at any place of Licensee's choosing, provided, however, that after the original construction of the transmitting facilities of the Stations is completed and/or following execution of this agreement, Licensee shall give sixty (60) days notice to Agent of any future relocation of any of the Stations. Such relocation shall only occur if it is in the best interest of both Parties.

WTB Ex. 339 at p. 5, ¶ VIII.

163. WTB Ex. 340 is a copy of a virtually identical replacement agreement executed on December 30, 1994. The agreement was re-executed because Kay had initially neglected to pay Sobel a \$100 fee to effectuate an option provision in the written agreement, and in order to expand the list of call signs covered by the agreement. WTB Ex. 228 at pp. 110-111; WTB Ex. 341. The agreement gives Kay an option to acquire any one of the Sobel stations for \$500. Sobel and Kay both understood an option to be a "future" right that may or may not ever be exercised. Tr. 1303, 1744-145. In fact, Kay has never exercised the option provision. Tr. 1746.

Prior to the written agreement, the parties had an understanding that Kay would have either an option or a right of first refusal. Tr. 1745-1746. Kay required this protection because he would be writing five year service contracts to resell service on the stations and needed to be assured of continued access to the channel capacity. WTB Ex. 229 at pp. 365-366.

164. Prior to the written agreement, the parties also had a long-standing understanding that if the stations were ever sold, Kay would share in the proceeds to compensate him for work he had done and expenses he had incurred in clearing the channels. Tr. 1747. All of the frequencies subject to the management agreement were, at the time they were acquired by Sobel, encumbered by other users, i.e., there were other licensees authorized to share use of the channels. Tr. 1747-1748. The process of "clearing" channels, researching the status of co-channel licenses, obtaining cancellation of inactive stations, negotiating assignments or cancellations of other licenses, etc., involved a great deal of work that Kay was in a better position to undertake. Tr. 1748.

165. Sobel was not, in any event, generally in the mode of selling stations. Tr. 1749. On the rare occasion when one of the management agreement stations was sold, the parties did not follow the specific terms of the option provision even after the written agreement was executed. For example, on one occasion Kay negotiated a deal with a third party whereby Sobel received \$20,000 from the sale of one of the channels, even though under the literal terms of the written agreement Kay could have exercised his \$500 option and diverted the additional monies to himself. Tr. 1746. On another occasion, Kay approached Sobel with an offer he had received from a third party to acquire all of the management agreement stations for \$1.5 Million. Sobel turned down the proposal and decided to keep the stations. Tr. 1749. This was at a time when Kay needed the money and could have exercised his option to acquire each of the stations for only \$500, but he instead went along with Sobel's desire to retain the stations. Id.

166. Under the oral arrangement between Kay and Sobel, Kay provided the equipment, but it was being leased to Sobel for use in the management agreement stations. Indeed, it was in large measure to compensate Kay for the provision of this equipment that it was agreed that Kay would receive the initial \$600 in revenue each month. The written agreement, however, expressly provides: "Agent [i.e., Kay] shall lease to Licensee [i.e., Sobel] all equipment necessary to construct and operate the Stations. All rents to be collected by Agent for lease of equipment to Licensee shall be deemed by the Parties to be a portion of Agent's compensation for services described herein." WTB Ex. 340 at p. 3 ¶ IV.

167. The written management agreement prepared by Brown and Schwaninger is no longer in effect, having been replaced by a revised agreement drafted by Kay's current regulatory counsel. Tr. 2370-2377; Kay Ex. 64. Kay explained that the new agreement was prepared and executed

[b]ecause while we believed the initial agreement was perfectly legal on all four corners, the Commission's scrutiny and the ruling that came from the Marc Sobel matter clearly indicated that the agreement may have some problems. So, we have had counsel draft

a new agreement which hopefully will be more on all four corners with the Commission's expectations and we executed the new agreement.

Tr. 2371.

### **Misrepresentation and Lack of Candor Issue**

#### Background

168. The issue added by Judge Sippel, requested by the Bureau in its Motion to Enlarge Issues filed on December 30, 1997, seeks a determination whether Kay "misrepresented facts or lacked candor in presenting a Motion to Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995 and January 25, 1995."<sup>24</sup> <sup>25</sup> Judge Sippel's addition of the issue was predicated on Judge Frysiak's conclusion that Sobel misrepresented facts in asserting in his January 25 affidavit that Kay did not have an interest in his stations. Judge Frysiak's conclusion rests, in large part, on his determination that Sobel intentionally concealed the Management Agreement between Kay and Sobel disclosing their relationship until July 3, 1996, in response to a 308(b) inquiry. See Marc Sobel, 12 FCC Rcd 22879, 22897, 22902 (ALJ, 1997).

169. Judge Frysiak's decision was tainted because the Bureau deliberately concealed the fact that Kay had given a copy of the Management Agreement to the Bureau on March 24, 1995.<sup>26</sup> Thus, in reaching his conclusion, the Judge was unaware of the March 24, 1995 filing and erroneously assumed that the Commission first received a copy of the Management Agreement on July 3, 1996. The Bureau concealed this information because it recognized that divulging that Kay gave a copy of the Agreement to the Bureau more than 2 years before the Bureau raised questions about the January 25, 1995 declaration seriously eroded its contention that Kay and Sobel intentionally deceived the Commission about their relationship, a necessary element in a misrepresentation finding. See Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). The following chart lays out the Bureau's elaborate scheme.

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<sup>24</sup> Kay's motion was initially misfiled with the Commission on January 12. An identical motion was then refiled with Judge Sippel on January 25.

<sup>25</sup> The Bureau sought unsuccessfully to add the same issue in a motion to enlarge filed April 9, 1997. See MO&O, FCC 97M-183, released November 5, 1997. The Bureau's request was posited on the contention that the December 30, 1994 Management Agreement between Kay and Sobel could not be reconciled with Kay's January 25, 1995 representation that he did not have an interest in any of Sobel's stations or license. Page 5. The Bureau was silent as to when it was given a copy of the Management Agreement. However, it was pointed out in the Opposition that a copy of the Management Agreement had been given by Kay to the Bureau in March 1995, a fact which the Bureau was forced to admit. Reply, Page 15. However, as discussed, infra, the Bureau never apprised Judge Frysiak of that critical fact.

<sup>26</sup> Official notice taken of Kay's Responses to Wireless Bureau's First Request For Documents.

- a. Designation Order in Sobel Case released February 12, 1997.<sup>27</sup> Order recites that the Commission first learned of the Management Agreement on July 3, 1996 when it received a copy from Sobel pursuant to a 308(b) letter of inquiry. Commission not informed of March 1995 filing of Agreement.
- b. Motion to enlarge issues filed April 3, 1997. Motion does not disclose that a copy of the Agreement was given to the Bureau in March 1995. Opposition recites: "Sobel has attempted in discovery in this proceeding to determine precisely when the Bureau became aware of and received a copy of the Agreement, but the Bureau has thus far refused to provide such information." Note 8. Bureau Reply filed May 1, 1997 continued to conceal March 1995 filing. Bureau also casts doubt on the Sobel Opposition by claiming inconsistency between Sobel's statements that he thought filing was made with the January 25 Declaration and that it had been filed in Kay discovery, an attack plan used in the hearing itself.
- c. MO&O, FCC 97M-82, released May 8, 1997. Filing of Agreement in March 1999 was not disclosed by the Bureau.
- d. Hearing on Misrepresentation Issue. Bureau sought to block out and cast doubt on testimony of Sobel that Agreement was to be filed with Kay discovery. Bureau Ex. 329, Tr. 300-304. Bureau, in examination of Sobel, seeks to establish in Judge's mind that Sobel first provided a copy of the Agreement on July 3, 1996. Bureau Ex. 329, Tr. 313-314.<sup>28</sup> Bureau continues to conceal March 25, 1995 filing.
- e. Bureau's Proposed Findings filed September 25, 1997. Continued concealment of the filing of the Agreement on March 1995. Bureau also cast doubt on Sobel's testimony that the Agreement was to be supplied in Kay discovery and stressed filing by Sobel of Agreement in July 1996 in order to establish intentional deception. See paragraphs 55, 62, 90 94, 99, among others.
- f. Bureau Reply to Sobel's Findings filed October 21, 1997. Continued concealment of March 1995 filing of Agreement.

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<sup>27</sup> 12 FCC Rcd 3298, 3299 (1997).

<sup>28</sup> Sobel's testimony in Sobel proceeding was received in Kay as Bureau Ex. 329. The Bureau was represented in both proceeding by the same counsel.

g. Bureau's Comments on Sobel's and Kay's Replies filed October 31, 1997.<sup>29</sup> Bureau falsely claimed: "none of Sobel's or Kay's filings in 1994, or 1995 disclosed the relationship between Sobel and Kay with respect to the Management Agreement stations." Par. 4. No disclosure of the March 1995 filing. Bureau emphasized Sobel's failure to produce the management agreement until specifically directed to do so by the Commission in 1996. Par. 6. Paragraphs 4-10, the Bureau's treatment of "lack of candor" is designed to mislead Judge Frysiak in order to establish intentional deception.

The January 25, 1995 filing

170. On or about January 25, 1995, Brown and Schwaninger, acting on Kay's behalf, submitted in the above-captioned proceeding a pleading entitled "Motion to Enlarge, Change or Delete Issues." WTB Ex. 343. That pleading included the following statement:

James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. ... Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named as party to the instant proceeding, the Commission should either change the [HDO] to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the [HDO] with respect to those stations.

WTB Ex. 343 at pp. 4-5. This was the sole reference to Sobel in the entire sixteen page pleading that addressed numerous other matters. *Id.* Kay executed a general supporting affidavit whereby he "declare[d] under penalty of perjury ... that the ... Motion to Enlarge, Change, or Delete Issues is true and correct." *Id.* at p. 23. Kay explained that he scanned through the document and saw no obvious errors and therefore executed the affidavit that had been supplied to him by his legal counsel. Tr. 1301. He did "not analyz[e] the meaning of every nuance of every word through it, not even close." Tr. 2443-2444.

171. Kay believes that when his attorneys wrote in the pleading that he had no "interest" in Sobel's licenses, they meant that "James Kay does not have a legal interest, an ownership interest, in the licenses held by Marc Sobel." Tr. 1301. Kay understood the language denying an interest in Sobel's licenses or stations to mean that Kay "had no ownership interest as in

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<sup>29</sup> Sobel's proposed findings were limited to the transfer of control issue. Sobel and Kay's Replies dealt with the misrepresentation issue. Bureau then filed comments relating solely to Sobel and Kay's Replies. The Bureau's Comments, filed pursuant to the Judge's Order, FCC 97M-176, released October 24, 1997, clearly played a major role in Judge Frysiak's conclusion that Sobel intentionally concealed his business relationship with Kay.

owning a part of this, being a partner, in any licenses that were issued to Marc Sobel." <sup>30</sup> Tr. 2444. Insofar as the pleading stated that Kay did not have an interest in any "license or station" authorized to Sobel, Kay has always used the two words (station and license) interchangeably, noting that FCC licenses are titled Radio Station License. Tr. 1314. He used the terms interchangeably and he believes Dennis Brown, who wrote the pleading, did also. Tr. 2444.

172. Kay was obviously aware of the management agreement at the time he executed the affidavit, but he also knew the management agreement had been prepared by the same attorneys who drafted the pleading and the affidavit. Tr. 2444. Kay was specifically advised, by counsel, that, in fact, that the management agreement did not constitute an interest. Tr. 2444-2445. In any event, there was not a great correlation between the management agreement and the motion for which the affidavit was executed. One objective of the motion was to have stations licensed to Sobel removed from the HDO, but this was not its primary purpose and, indeed, only one paragraph in the sixteen page pleading was devoted to this matter. WTB Ex. 343. Moreover, most of the management agreement stations were not even affected by the HDO. Only two of the eleven Sobel call signs listed in Appendix A to the HDO were subject to the management agreement. Compare HDO, Appendix A, items 154-164, and WTB Ex. 341 pp. 1 & 837. The other nine stations included in the HDO had no connection to Kay whatsoever. *Id.* Conversely, fourteen out of the sixteen management agreement stations were not listed in the HDO. *Id.*

173. Kay and Sobel testified in this proceeding and answered questions put to them in a candid and forthright manner. Their testimony that they did not intend to deceive the Commission concerning their business dealings is entirely credible and is accepted.

174. Further, their testimony is buttressed by the evidence showing that Kay informed the Commission of their business relationship long before any questions were raised by the Bureau. Thus, on March 10, 1995, in response to the Bureau's First Set of Interrogatories, Kay informed the Bureau that "Kay manages stations which are authorized to Marc Sobel" and on March 24, 1995, Kay gave the Bureau a copy of the Management Agreement which fully spelled out their business arrangement. This was more than two years before the Bureau first raised questions in its motion to enlarge filed April 3, 1997 in the Sobel's case. <sup>31</sup>

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<sup>30</sup> Kay's testimony is consistent with the testimony given by Kay and Sobel in the Sobel proceeding as to what they meant by the use of the word "interest." WTB Ex. 328, pp. 146-148; WTB Ex. 329, pp. 371-372.

<sup>31</sup> Significantly, one year earlier, March 6, 1996, the Bureau sought certification to remove Sobel's licenses from the Kay proceeding. Although, aware that "Kay manages stations which are authorized to Marc Sobel." Note 2, the Bureau's pleading does not indicate or even suggest that Kay or Sobel misrepresented facts or lacked candor. The Bureau first raised a question of the propriety of the January 21, 1995 filing, when it sought a misrepresentation issue against Sobel in April 1997 (more than a year after it was given a copy of the Management Agreement).

## CONCLUSIONS

### Section 308(b) Issue

175. This issue is "[t]o determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries." HDO at ¶ 10(a). Section 308(b) of the Communications Act provides, in pertinent part:

The Commission, at any time after the filing of [an] original application and during the term of any ... license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such ... statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

47 U.S.C. § 308(b), Section 1.17 of the Commission's Rules and Regulation provides:

The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

47 C.F.R. § 1.17. For the reasons recited infra, it is concluded that this issue is resolved in Kay's favor.

176. There is no suggestion by the Commission in the HDO that Kay made any false statement in his response to the 308(b) request and the Bureau did not seek any modification or enlargement of the issues to permit consideration of a misrepresentation issue. Further, there is not any record evidence to support such a contention. The issue as designated, is whether Kay violated his obligations under 308(b) "by failing to provide information requested in his responses to Commission inquiries." HDO at ¶ 10(a). Accordingly, the Bureau's reliance in its Findings on FCC v. WOKO, Inc., 329 U.S. 223 (1946); RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981); and Trinity Broadcasting of Florida, Inc., 10 FCC Rcd 12020 (ALJ), which involve intentional misrepresentation and lack of candor, are misplaced.

177. While the Commission and its operating Bureaus have the unquestioned right to require its licensees to provide information necessary to accomplish the Commission's public interest responsibilities, there are limits. The point where an investigation exceeds permissible bounds was articulated in Stahlman v. FCC, 126 F.2d 123 (D.C. Cir 1942) where the Court said

the Commission is not authorized "to require appellant or other witness whom it may summon to bare their records, relevant or irrelevant in the hope that something will turn up or to invade the privacy protected by the Fourth Amendment" Id at 128. While Stahlman involved a 403 investigation, the Court's admonition applies equally to 308(b) inquiries, such as that directed at Kay. The Bureau's 308(b) letter of inquiry to Kay exemplifies what is not permissible.

178. In each of the cases relied on by the Bureau, the 308(b) inquiry specifically informed the licensee of the conduct in question and the inquiry was narrowly focused to obtain the necessary information. Thus, in Carol Music, Inc., 37 FCC 379 (1964), the 308(b) information sought concerned broadcasts in aid of illegal gambling. In Warren L. Percival, 8 FCC 2d 333 (1967), the Commission sought specific information concerning whether the licensee had been convicted of a crime. Also, the 308(b) inquiry in PTL of Heritage Village Church, 7 FCC 2d 324 (1979) was narrowly focused to specific fund raising matters under scrutiny.

179. Unlike these cases, a review of the 308(b) letter authored by W. Riley Hollingsworth<sup>32</sup> leads to the conclusion that the Bureau was engaged in a fishing expedition with the hope that something would turn up. Rather than explaining the nature of any particular inquiry, complaint, or alleged violation and asking for focused information, Kay was being asked to provide virtually every detail regarding the operation of his business. This included sensitive information such as his entire customer list<sup>33</sup> and details regarding the technical configuration of each of his customers' system (which raised serious concerns for safety to liability and financial exposure). In addition, as reflected in the correspondence exchanged between Hollingsworth and Brown's lawyer, all of Kay's reasonable requests for modification of the extremely broad inquiry were arbitrarily ignored by Hollingsworth without explanation. The Bureau had the burden of demonstrating that the information sought was relevant and was material to specific concerns raised about specific licensee operations of Kay and that it was not engaged in a fishing expedition with the hope that something would turn up. It did not do so. Neither Hollingsworth, the author of the 308(b) request or any other Bureau official was called

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<sup>32</sup> Hollingsworth was the author of the January 31, 1994 initial letter and all of the other pre-designation correspondence from the Bureau. Hollingsworth was at that time a deputy division chief within what was then the Private Radio Bureau. See Bureau Ex. 1.

<sup>33</sup> Aside from the question whether there are loading requirements for all of the frequencies on which Kay operates, the request for loading information as of an arbitrary date is contrary to Commission policy. In its Report and Order, released August 31, 1992, the Commission made clear that it was not satisfied that the existing method of demonstrating loading on the basis of conditions existing at the time an application is filed produces the most reliable information. "A snapshot of loading at a single point in time may not necessary accurately reflect real system loading." The Commission changed the loading demonstration to the "average loading on the first business day of the month for each of the six months prior to the date on which the application requiring a showing of the loading is filed based on the business records of the SMR base station licensee." Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, 7 FCC Rcd 5558, 5561 (1992). In this connection, Kay's lawyer complained about the loading methodology insisted on by Hollingsworth. Findings 19, supra. However, this complaint, as other requests for clarification and modification of the 308(b) request, were ignored.



on as a witness to justify the Bureau's inquiry. On the basis of the record, it is concluded that the initial request which was unlimited in scope, seeking information involving all of Kay's 152 licenses was arbitrary and unreasonable and that the Bureau's unwillingness to clarify and narrow the initial request so as to address specific concerns about specific licenses was equally wrong. Under the circumstances, Kay can not be faulted for raising legal objections and for failing to provide all the information sought. In this connection, the findings establish that Kay did not have the computer capability to provide the Bureau the information it sought. His actions can not be viewed as an act of defiance of the Commission's lawful authority and does not warrant a sanction.

180. There are additional reasons, detailed in the Findings, why no sanction is warranted. Briefly recited, unlike cases relied on by the Bureau, after the case was designated for hearing, in the course of discovery, Kay provided the Bureau with all of the information that had been sought in the 308(b) Request.<sup>34</sup> In all, Kay turned over some 36,000 documents. In addition, the 308(b) request was received by Kay only two weeks after the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and his personal residence. The earthquake directly affected Kay's literal and physical ability to respond to the 308(b) request.

181. Finally, a series of actions by the Bureau raised legitimate concerns in Kay's mind whether the data sought would be kept confidential. These actions, detailed in the Findings, consisted of: (a) the Bureau's extremely broad request, which it has been concluded, was arbitrary and unreasonable; (b) the Bureau's unreasonable unwillingness to narrow its request; (c) the Bureau's unwillingness to provide assurance consistent with Kay's past experience, that the information to be supplied would be held in strictest confidence and not disclosed to a person who is not a Commission employee;<sup>35</sup> (d) the Bureau's unexplained irrational demand for 50 copies of Kay's response; and (e) the circumstances surrounding the Bureau's denial of Kay's finders preference request. Accordingly, a fair review of the record adduced at hearing and the applicable precedent requires resolution of this issue in Kay's favor.

#### Construction and Operation Issue

182. This issue is "[t]o determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Section 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules. HDO at ¶ 10(c). The

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<sup>34</sup> Subject to the proper exercise of his right to interpose and be heard on legal objections, Kay complied with all discovery demands made at hearing by the Bureau as modified by Judge Sippel. See Memorandum Opinion and Order, FCC 95M-77, released March 22, 1995.

<sup>35</sup> The Bureau asserted that if Kay wished to have submitted material withheld from public inspection, he would be required to submit such a request concurrently with the submission of the material (see Finding 16), heightening Kay's concerns that his competitors would be able to obtain sensitive information through the Freedom of Information Act.

reference to 90.627 of the Rules is no longer relevant to the Construction and Operation Issue. See MO&O 98M-94. The issue may be treated in two parts: (1) whether Kay failed to timely construct and/or permanently discontinued operation of one or more authorized stations; and (2) whether Kay violated applicable loading requirements. In either case, however, the focus of this issue is not simply whether Kay at some time or another failed to comply with one or more rule provisions, but whether he engaged in willful or repeated violation of the specific rules listed in the issue. It is concluded that the Bureau has failed to meet its burden of establishing that Kay engaged in willful or repeated violation of the specified Rules.

#### Timely Construction and/or Permanent Discontinuance

183. At all times and to the extent relevant to this issue, Section 90.155 required that conventional stations "must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission." 47 C.F.R. § 90.155(a) (1994); <sup>36</sup> accord 47 C.F.R. § 90.633(c)-(d) (1994). Section 90.631(e) required that "licensees of trunked facilities must complete construction within one year." 47 C.F.R. § 90.631(e) (1994), and Section 90.631(f) provided for automatic cancellation if this construction deadline is not met. 47 C.F.R. § 90.631(f) (1994).

184. At all times and to the extent relevant to this case, Section 90.157 of the Rules provided:

A station license shall cancel automatically upon permanent discontinuance of operations. Unless stated otherwise in this part or in a station authorization, for the purpose of this section, any station which has not operated for one year or more is considered to have been permanently discontinued.

47 C.F.R. § 90.157 (1994); accord 47 C.F.R. § 90.631(f) (1994) (specifying a shorter time for some 800 and 900 MHz trunked system licenses).

185. The parties have stipulated that, as to each site annotated as "Not in operation" in the "Comments" column of Attachment A to Kay's May 11, 1995, Amended Responses to Wireless Telecommunications Bureau's First Set of Interrogatories (WTB Ex. 290), that facility was either not timely constructed or operation of that facility had been permanently discontinued as of May 11, 1995. Tr. 1232. The Bureau presented no evidence that any authorized facilities other than those specifically covered by this stipulation were not timely constructed or that operation of any such facilities has been permanently discontinued. Moreover, the Bureau has not demonstrated any improper conduct or motive in connection with the facilities specifically covered by the stipulation. Accordingly, the record does not support any adverse conclusion

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<sup>36</sup> The regulatory provisions relied upon are as codified in the 1994 edition of the Code of Federal Regulations, revised as of October 1, 1994. There have been many amendments and revisions to the rules since the HDO, and, to the extent possible, references to the rules in this decision will be to the regulations in effect as of the release date of the HDO, i.e., December 13, 1994.

against Kay in this regard, nor does the record warrant any sanction other than that separately considered under the Automatic Cancellation Issue.

### System Loading

186. The Bureau proposes adverse conclusions under the "loading" issue as to Kay's conventional channels. The rules relied on by the Bureau are Section 90.313 and 90.633.<sup>37</sup>

187. A review of the subject rules indicates that there are no loading "requirements" per se for conventional channels. It appears that loading on conventional channels becomes an issue only in specified application processing contexts. For example, an applicant for additional channels may, depending on the circumstances, be required to demonstrate that any existing systems licensed to him in the same area and in the same frequency band are loaded. E.g., 47 C.F.R. §§ 90.313(c), 90.623(d), & 90.633(e). Thus, a determination of whether a conventional channel licensee has violated "loading" rules requires much more than a snapshot comparison of authorized mobile units versus current actual loading count. It requires, rather, a demonstration that an applicant filed a particular application that required loading which the applicant did not, at the time of the application, have. The Bureau has not so demonstrated.

188. In addition, as pointed out by Kay and not disputed by the Bureau, channels below 470 MHz are not assigned on an exclusive basis, regardless of loading, and are not subject to any sort of loading requirements. Accordingly, the Bureau's inclusion of Kay's stations operating below 470 MHz in its loading analysis<sup>38</sup> was improper and inapposite. As to Business Radio Service stations operating in the 470-512 MHz band, the Rule only prescribes a maximum loading limit, in that no more than 90 mobile units will be authorized on a given channel in a given service area. 47 C.F.R. § 90.313(a)(3) (1994). The Bureau has not demonstrated, or even alleged, that Kay exceeded the maximum loading level.

189. For 800 MHz Conventional SMR stations, the Rule indicates an existing licensee typically may only receive authorization for an additional channel in the same service area if loading on the existing channel is at least 70 units. 47 C.F.R. § 90.633(e) (1994). Section 90.633(a) specifies that loading requirements apply to the channel as a whole, not any one particular licensee. Accordingly, to determine whether an existing licensee is eligible for an additional channel it is necessary to examine the loading of all licensees sharing that channel, not simply the loading of the applicant.

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<sup>37</sup> The Bureau has not presented evidence and has not urged an adverse determination against Kay under the loading issue as to his trunked system. It is therefore not necessary to consider the applicability of Section 90.631 to the particular trunked systems licensed to Kay. In any event, the record shows that as of November, 1995, based solely on Kay's computer-maintained billing records, Kay's trunked SMR (YX) systems were loaded to well over the 70 mobile per channel standard required to retain the channels.

<sup>38</sup> WNQK532, WNQK959, WNXC713, WNZL447, WPBX246. WPBX247, and WPPE253. WTB PF&C at ¶¶ 48, 90-91, 94, 96-96, 99.

190. The Bureau has not demonstrated that Kay ever submitted any application which triggered Section 90.633(c) of the rules for which he was not adequately loaded at the time. The Bureau instead complains about Kay's lack of historical loading records. The Bureau states: "[T]he record evidence demonstrates that Kay did not have the ability to accurately determine or report his loading to the Commission." WTB PF&C at ¶ 234. Elsewhere the Bureau asserts: "The evidence ... indicates Kay did not have a means of accurately counting his loading to determine his eligibility ...." *Id.* at ¶ 216.<sup>39</sup> The record does not support the Bureau's assertion. As to any particular application as to which specific loading requirements might be applicable, Kay would have been able and willing to provide current loading information if the Commission requested it. For example, if the Commission had at any time requested the loading on a particular channel, Kay could first check his billing system, then examine his paper records, and, if necessary, collect relevant information from additional sources, *e.g.*, determining from dealers how many units are active on the system. However, to collect historical information on an across-the-board basis for more than 150 calls signs, many of them involving multiple channels and/or multiple base station sites, was a virtually impossible task. As earlier noted, the Bureau's request was an impermissible fishing expedition.

191. Further, even assuming, *arguendo*, that the Rules contained a loading requirement in non application processing situations, the Bureau's reliance on loading as of a specific date runs counter to Commission policy and is invalid as a measurement of Kay's system loading. As discussed, *supra*, the Commission has made clear that a snapshot of loading at a single point in time does not accurately reflect system loading. The Commission has adopted a standard requiring a showing of average loading over a six month period.<sup>40</sup> The Bureau has not offered such a showing, providing a further reason for rejecting its contention that Kay's "loading" was inadequate.

192. Moreover, in evaluating Kay's loading, the Bureau improperly limits its analysis solely and exclusively to Kay's computer billing records, even though the evidence shows that they were not kept primarily for loading information and do not present a complete or accurate picture of the system loading.<sup>41</sup> The rules do not specify any particular form for loading records -- indeed, the Commission does not expressly require loading records at all, but rather states that it will evaluate loading based on the licensees "business records." Kay's computerized billing

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<sup>39</sup> The Bureau went on to assert that Kay "avoided scrutiny of his loading by filing applications in the name of surrogates, and wholly owned corporations." *Id.* at ¶ 217. The Bureau is apparently referring to the applications it discusses under the Abuse of Process Issue. But in no case has the Bureau demonstrated, as to any one of these applications, that Kay was ineligible to apply for the same facilities in his own name, or that Kay's involvement with the application was concealed in any way from the Commission.

<sup>40</sup> See Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Carriers, 7 FCC Rcd 5558, 5561 (1992).

<sup>41</sup> Kay explained at hearing the many reasons why the computer billing records will not give a full or accurate picture. For example, due to limitations in earlier versions of the billing software, a customer who has access to four mountain top repeaters might only show in the billing records as having access to two. *E.g.*, Tr. 1074-1075.

records tell only part of the story. There are also the paper files for each customer which include more detailed information that will also be informative as to system loading.<sup>42</sup> Although these were among the 36,000 documents produced by Kay in discovery, the Bureau chooses instead to focus solely and exclusively on the computerized billing records. The Bureau can not dictate which of Kay's business records will count for loading purposes and which do not.<sup>43</sup> The current rules by which the Bureau is bound do not specify what records will count and how they are to be maintained. It is therefore entirely inappropriate for the Bureau to limit its examination solely to business records that admittedly do not tell the full story.

193. In addition, the billing records did not include information about loaners and demo units, rental units, or the extensive use of Kay's system by other radio shops and dealers. The Bureau's objection that nothing other than the billing records may be considered because the billing records are what Kay produced when ordered by Judge Sippel to produce loading records. WTB PF&C at n.22, is without support. When he produced this information, Kay expressly disclosed these limitations, stating:

Kay's records do not reflect Kay's own shop use, nor records of other users in other shops who used radios at no charge, and these records do not include rentals, demos and loaners, because none of these records resulted in customer billing for repeater services, even though use of the repeaters did occur.

WTB Ex. 19 at p. 2.<sup>44</sup> Moreover, in addition to the billing information, Kay also produced 36,000 documents including his paper files for each repeater customer.

194. Unable to demonstrate that Kay lacked eligibility as to any particular application or that he was not properly loaded in the context of any application requiring it, the Bureau has attempted to come in the back door by arguing that Kay should have amended his authorizations

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<sup>42</sup> One example of how review of the customer's paper files (which are also part of Kay's business records and therefore may be used to establish loading) can be used to clarify specific questions is the situation with Yale Chase Materials Handling, a Kay repeater customer. When confronted with a specific question in a Bureau exhibit suggesting a possible discrepancy as to their number of mobiles, Kay was able to go to that specific customer file and resolve the matter. Tr. 2499-2503. Had the 308(b) Request asked Kay to justify loading for a specific station or even for a manageable group of stations, he could have engaged in a similar analysis and presented loading information supported by these customer records. But the 308(b) Request asked him for the complete loading of all his authorizations -- without regard to whether they were subject to any loading requirements.

<sup>43</sup> The Bureau disputes Kay's assertion that the 36,000 documents produced in discovery are essentially the same documents that would have been required to answer the 308(b) Request, retorting that the Bureau only sought a "list" of Kay's customers. WTB PF&C at ¶ 43. This is not true. The 308(b) Request sought a report of which customers were using which stations. Because of the limitations of Kay's billing system--which was neither designed nor used to maintain loading records for regulatory purposes--the paper files and other records would also have been required.

<sup>44</sup> This was way back in 1995. The Bureau had more than ample opportunity to conduct further discovery to test these assertions, but chose not to do so. In this regard, the Bureau deposed Kay over a four day period and apparently, did not ask a single question about the use of radios at no charge.

to reflect changes in loading. The Bureau's contention is that at a number of Kay's stations, the billing records, as of 1995, in many cases reflect less units than are authorized for the system. According to the Bureau, Kay was required by Section 90.135(a)(5) of the Rules, as in effect at the time of designation, 47 C.F.R. § 90.135(a)(5) (1994), to amend the authorizations for these stations to reduce the number of authorized mobiles. WTB PF&C ¶¶ 231-238.

195. Initially, Section 90.135(a) was not specifically mentioned in the HDO and the issues against Kay did not include a violation of this rule. Moreover, the Bureau never sought to modify the issues to permit consideration of a violation of this rule. Contrary to the Bureau's assertion, the Bureau can not unilaterally modify the HDO by mentioning the rule in a prehearing "Statement of Readiness for Hearing." Consequently, since the alleged violation of Section 90.135(a)(5) of the Rules is beyond the scope of the HDO, it can not be considered.

196. Even assuming an alleged violation of Section 90.135(a)(5) was included among the many issues designated in this case, the Bureau's proof falls far short of establishing a violation. The Bureau's proof of an alleged violation consists of the billing records of March and/or November 1995. The Bureau offers no Commission precedent for the methodology it has employed. Aside from the deficiencies in relying solely on billing records, the Bureau's proof runs counter to the Commission's determination that a snapshot of loading at a single point in time does not accurately reflect system loading.

197. The rule itself does not indicate how soon a commercial operator must amend after a change in actual loading. In addition, a search of Commission precedent does not directly address the question. However, it is reasonable to assume that Section 90.135(a)(5) of the Rules does not require an immediate amendment each and every time there is a change in the loading on a station used to provide commercial service to public customers. It is to be expected that the actual loading for a commercial service provider (i.e., a private carrier licensee in the 470-512 MHz band and/or an SMR licensee in the 800 MHz band) will fluctuate over any particular period of time. Surely, a reasonable interpretation of the rule allows for the normal ebb and flow of business.

198. It is precisely for these reasons that the Commission has rejected the snapshot approach employed here by the Bureau. The Commission has decided that the six months averaging method is a reliable loading indicator where an application requiring a showing of loading is required. In the absence of evidence indicating the Commission has adopted a different standard in applying Section 90.135(a)(5), it is reasonable to use the same indicator which the Commission employs when an application for additional frequencies is filed. Thus, a showing that Kay has violated Section 90.135(a)(5) requires the Bureau to establish, with respect to each of Kay's authorizations, that the mobile count during a six month averaging period fell below the relevant level. The Bureau has not presented such evidence. Accordingly, for all the reasons set forth supra, the "loading" issue is resolved in favor of Kay.

Abuse of Process Issue

199. This issue is "[t]o determine whether James A Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Section 90.623 and 90.629. HDO at ¶ 10(d). Section 90.629 is no longer at issue in this proceeding. See MO&O 98M-94. The Bureau has failed to meet its burden of showing that Kay was the real party in interest in any of these applications, and has not, in any event, demonstrated that Section 90.623 would have precluded Kay from submitting any one of the questioned applications in his own name. It is therefore concluded that the Bureau has failed to meet its burden of proof under the issue.

200. The Bureau asserts that Kay abused the Commission process "by submitting applications for end user licenses in the names of individuals who had no bona fide intention of using radios." WTB PF&C at ¶ 250. Specifically, the Bureau claims: "Kay filed bogus end user applications in the names of Roy Jensen, Kevin Hessman, and Vincent Cordaro. While those applications represented that these individuals had businesses that required the use of radios, these individuals, who were employees of Kay, had no intention of using radios in these alleged businesses." Id. at 253. The Bureau's theory is that Kay did this as part of a scheme to "warehouse" spectrum so that he would have capacity to serve future users. Id. at ¶¶ 251-252.<sup>45</sup>

201. Contrary to the Bureau's assertions, the undisputed record establishes there is a factual basis for Kay's belief that each of these individuals either were engaged in or intended to engage in pursuits beyond the scope of their employment by Kay in which they desired to use Kay's radios and repeaters. See Kay PF&C at ¶¶ 95-97, 104, 115. In these circumstances, prior to October of 1992, it would have been unlawful for Kay to have permitted these individuals to operate radios on his system for their own outside pursuits unless such operations were licensed.

202. The credibility of the witnesses against Kay on this issue is also questionable for other reasons. Both Hessman and Jensen were found to have made misrepresentations under oath before the Office of Appeals of the California Unemployment Insurance Appeals Board regarding the circumstances of their discharge from Kay's employ.<sup>46</sup> In addition, Cordaro tells inconsistent

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<sup>45</sup> The Bureau makes inconsistent arguments. Here, in furtherance of its charge of abuse of process, it asserts that Kay was in such dire need of excess capacity that he had to file bogus applications to make certain he would be able to serve users. Under the loading issue, however, the Bureau argues that Kay had dozens upon dozens of unloaded repeaters (and, hence, excess capacity). The Bureau can not have it both ways, and has not met its burden of proving either theory.

<sup>46</sup> The Bureau's attempt to negate the findings that Jensen and Hessman misrepresented facts in their unemployment hearings by accusing Kay of similar misconduct is indefensible. The Bureau's claim that Kay's reason for firing Hessman was different than he testified to at the unemployment hearing (WTB PF&C at ¶ 262) is a distortion of the record. The Bureau has not offered a shred of support showing that the reasons relied upon by Kay at the unemployment hearing were not true. The fact that Kay also had another reason for wanting to discharge Hessman - the one he could not absolutely prove - does not make the reason on which he did rely untrue. Kay testified in this hearing as follows:

stories. At hearing he denied having obtained an authorization in pursuit of an independent business activity; but in 1992 he signed and submitted to the Commission a declaration, under penalty of perjury, attesting to the opposite. WTB Ex. 351 at pp. 2 & 5. Also, the evidence adduced indicates that Cordaro further misrepresented to the Bureau during the investigation, to Kay during discovery, and to the Presiding Judge and the Commission during the hearing regarding the facts and circumstances surrounding computer files he removed from Kay's system. All three of these men have reason to dislike Kay and are clearly biased against him. Their testimony is not credible and is not accepted.

203. There is also reason to question the reliability, if not the credibility, of Carla Pfeifer. She purports to have vague and incomplete recollections about events that allegedly occurred ten plus years ago. She questions whether her signature on various documents is genuine, even though (a) the documents were all in her possession until such time as they were turned over to FCC investigators, and (b) she has no idea of who might have signed them. She acknowledged that she acquired the station as a business opportunity, but then she claims to have agreed to assign the license without any information or understanding of what the terms of the assignment were to be; indeed, she was not even aware until she was cross-examined at the hearing that the assignment had in fact been granted years ago. Ms. Pfeifer's testimony is certainly not adequate to sustain the Bureau's burden of proof. The Bureau has failed, in any event, to show that Kay would have had any motive for using Pfeifer as an application shill. See, paragraph 207 below.

204. Significantly, the Bureau is charging Kay with preparing and filing false applications, but in many cases it has not even placed copies of the applications in evidence. In the cases of Jensen and Cordaro, for example, the Bureau offered only copies of the resulting licenses, but Kay forthrightly admitted that he probably prepared or assisted in the preparation of the applications. There is no evidence that Kay in any way concealed his involvement. In the Roy Jensen end user application, for example, Kay's name and the call sign of Kay's associated station were handwritten (most likely by Kay) on the application. WTB Ex. 306 at p. 3. And the contact phone number provided at two different places on the application is a business number that rings at Kay's offices. WTB Ex. 306 at p. 1.

205. The Bureau further charges that Kay abused Commission process "by using the names of other to apply for additional frequencies for himself." WTB PF&C at ¶ 254. In this connection the Bureau is referring principally to the base station licenses held by Carla Pfeifer, Vincent Cordaro, Jerry Gales, and Marc Sobel. As the Bureau correctly notes, "it is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party." Id., quoting Trinity Broadcasting of Florida, Inc., 10 FCC Rcd 12020, 12060 (ALJ 1999). But the Bureau has not

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[Hessman] very nicely gave me a justifiable firing by his actions, so he was fired both for what he did that I could not prove and for something he conveniently gave me that I could prove and did prove and I fired him.

Tr. 1294. Emphasis supplied.



met its burden of proving that Kay did any such thing. The Bureau has presented absolutely no evidence or other showing that Kay was ineligible to hold the licenses in question, and the Bureau has offered no evidence showing that Kay in any way acted to conceal his involvement in the applications; indeed, in many instances Kay's name and telephone number was provided in the applications as the contact person and the one who prepared the application.

206. Kay explicitly testified that he could have easily applied, in his own name, for the Castro Peak license held by Carla Pfeifer had he so desired, Tr. 2432-2433, and the Bureau has not contradicted this. The record indicates that most, if not all, of the management agreement station licenses held by Marc Sobel were, at the time he obtained them, on encumbered channels. E.g., WTB Ex. 229 at pp. 198-199. The Bureau has not disputed this. Kay demonstrated that, if he had desired to apply in his own name for the Rasnow Peak authorization held by Cordaro, he would have been able to do so by simply demonstrating a need for only 9 mobile units, based on an analysis of the loading environment on the channel at that time. Tr. 2479-2483. The Bureau has not disputed this.<sup>47</sup> In this connection, the record establishes Kay's adeptness at obtaining licenses on encumbered channels in his own name in circumstances where there were existing users already on the channel. E.g., Kay PF&C at ¶ 93.

207. Abuse of process, especially the particular manifestation of it alleged here, is a very serious charge. It can not be supported by mere speculation. It was incumbent upon the Bureau to prove that Kay did the acts it alleges. The Bureau can not even make out a case that Kay had any motive to do the things alleged. It has not demonstrated that Section 90.623 would have precluded Kay from submitting any one of the questioned applications in his own name. Accordingly, since the Bureau has not satisfied its evidentiary burdens, the issue is resolved in Kay's favor.

#### Malicious Interference Issue

208. This issue is "[t]o determine whether James A. Kay, Jr. willfully or maliciously interfered with the radio communications of other systems, in violation of Sections 333 of the Act." HDO at ¶ 10(e). The Bureau has recommended resolution of this issue in Kay's favor. It is therefore not necessary to address the matter further.

#### Effect of De Facto Control Issue

209. The issue as framed by Judge Sippel seeks to determine "[w]hether based upon the findings and conclusions reached in WT Docket No. 97-56 concerning Kay's participation in an

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<sup>47</sup> Official notice is taken of the fact that the authorization held by Jerry Gales, Call Sign WPFF295 at Heaps Peak is co-channel to and short-spaced with Trunked SMR Station WNPJ874 operated by Kay at Mount Lukens. Heaps Peak, being only 65 miles from Mount Lukens, is well within the 105 mile protection area for Station WNPJ874. Accordingly, there would have been no need for Kay to have used Jerry Gales as a shill if he wanted to apply for this channel in his own name at Heaps Peak.

unauthorized transfer of control Kay is basically qualified to be a Commission license." <sup>48</sup> It is concluded that such findings and conclusions do not render Kay unfit to be a Commission licensee.

210. As discussed in Findings 168 and 169, the Sobel conclusion that Sobel was unfit to be a licensee was tainted by the fact that the Bureau deliberately concealed the fact that Kay provided to the Bureau a copy of the Management Agreement in March 1995. The Bureau did more than conceal this critical information. It falsely stated in its October 31, 1997 Comments to Kay's and Sobel's pleadings relating to the misrepresentation issue that "none of Sobel's or Kay's filings in 1994, or 1995 disclosed the relationship between Sobel and Kay with respect to the Management Agreement stations." Par. 4. <sup>49</sup> Thus, Judge Frysiak erroneously assumed that the Bureau first obtained a copy of the Management Agreement in July 1996, in response to a letter of inquiry to Sobel. See Judge Frysiak's Initial Decision, 12 FCC Rcd at 22902, para. 74, 77. There is no doubt that his ultimate conclusion that Sobel "made misrepresentations and lacked candor about the transfer of control" (para. 78) was based on his erroneous assumption as to when the Agreement was given to the Bureau. In light of these considerations, Judge Frysiak's conclusion must be disregarded in determining Kay's fitness to be a licensee.

211. An unauthorized transfer of control, in and of itself, is not grounds for disqualification unless coupled with an intent to deceive or other disqualifying conduct. E.g., Deer Lodge Broadcasting, Inc., 86 FCC 2d 1066, 49 Rad. Reg. 2d (P&F) 1317 at ¶¶ 63-67 (1981); Blue Ribbon Broadcasting, Inc., 90 FCC 2d 1023, 51 Rad. Reg. 2d (P&F) 1474 at ¶¶ 7-9 (Rev. Bd. 1982); Silver Star Communications - Albany, Inc., 3 F.C.C.R. 6342 at ¶¶ 52-58 (Rev. Bd. 1988), aff'd 6 F.C.C.R. 6905, 70 Rad. Reg. 2d (P&F) 18 at ¶¶ 13-20 (1991); Roy M. Speer, 11 F.C.C.R. 18393 at ¶ 88 (1996). While this principle evolved in broadcast cases, it applies equally in the wireless services. Brian L. O'Neill, 6 F.C.C.R. 2572, 69 Rad. Reg. 2d (P&F) 129 at ¶30 (1991); Centurv Cellunet of Jackson MSA Limited Partnership, 6 F.C.C.R. 6150, 70 Rad. Reg. 2d (P&F) 214 at ¶ 8 (1991); Catherine L. Waddill, 8 FCC 2710, 72 Rad. Reg. 2d (P&F) 500 at ¶ 19 (1993); Applications of Motorola, Inc., supra.

212. The Commission's usual response to unauthorized transfers is to require them to be undone. E.g., Ellis Thompson, 3 F.C.C.R. 3962 (Mob. Serv. Div. 1988) (cellular application granted conditioned on removal from an agreement a paragraph potentially conferring control on

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<sup>48</sup> The issue as framed by Judge Sippel does not permit the Presiding Judge in this case to make independent findings as to whether the Management Agreement between Sobel and Kay constituted an unauthorized transfer of control. However, it should be noted that in determining whether management agreements executed by SMRs constitute a transfer of control the Commission does not use the six-prong test of control spelled out in Intermountain Microwave, 24 RR 983 (1983). See Third Report and Order, 9 FCC Rcd 7988, 8095-8096, note 434 (1994) comparing Intermountain and test used in Application of Motorola, Inc., File No. 507505, Order, para. 14 (July 30 1985).

<sup>49</sup> This Judge has never seen prosecutorial misconduct of this magnitude in the twenty years he has presided over Commission cases. Such misconduct can not be countenanced. It is completely contrary to the Commission's duty and responsibility to treat all its licensees in a fair and evenhanded manner.

a third party), affirmed on recon., 4 F.C.C.R. 2599 (Com. Car. Bur. 1989), affirmed on review sub nom. Ellis Thompson Corp., 7 F.C.C.R. 3932 (1992), reversed on other grounds sub nom. Telephone and Data Svstems, Inc. v. FCC, 19 F.3d 42 (D.C. Cir 1994); Petroleum V. Nasby Corp., 10 F.C.C.R. 6029 (Rev. Bd. 1995) recon. granted in part, 10 F.C.C.R. 9964 (Rev. Bd. 1995) (renewal and belated approval of an unauthorized transfer of control issued subject to a divestiture condition), remanded on other grounds 11 F.C.C.R. 3494 (1996). When a sanction has been imposed, it is typically a forfeiture, not license revocation. E.g., Rasa Communications Corp., 11 F.C.C.R. 13243 (1996); Kenneth B. Ulbricht (DA 96-2193; released December 31, 1996); Galesburg Broadcasting Co., 6 F.C.C.R. 2210 (1991); The Hinton Telephone Co., 6 F.C.C.R. 7002 (1991), forfeiture reduced, 7 F.C.C.R. 6643 (1992). See also, Forfeiture Policy Statement, 12 F.C.C.R. 17087 (1997).

213. Turning to the facts of this case, as discussed in the Findings, the written management agreement was prepared for Kay and Sobel by Washington, D.C. communications counsel, and both individuals were specifically advised that it complied with applicable FCC requirements. Moreover, there is no evidence of an intent to conceal the business arrangement from the Commission. The Agreement was voluntarily given to the Bureau in March 1995, long before the Bureau raised any questions about its propriety. Therefore, consistent with Commission precedent, even if it is ultimately concluded that the Agreement constitutes an unauthorized transfer of de facto control of Sobel's stations to Kay, the transgression is not grounds for disqualification. In addition, a requirement to undo the Agreement is not necessary since the Agreement is no longer in effect, having been replaced by a revised agreement drafted by Kay's current regulatory counsel. Further, the assessment of a forfeiture would appear to be precluded by the statute of limitation. See Section 503(b)(6)(B) of the Act and Section 1.80(c)(3) of the Rules which provide that no forfeiture penalty shall be imposed if the violation occurred more than one year prior to the issuance of the appropriate notice. However, even if this was not the case, a forfeiture would not be warranted considering the complete absence of an intent to conceal the Agreement. Kay having given the Bureau, in good faith, a copy of the agreement in March 1995. If the Bureau found the Agreement wanting, it should have timely notified Kay and Sobel of that fact, instead of waiting more than a year and designating Sobel's applications for hearing on the pretext that the agreement was first filed in July 1996. Under the circumstances, no sanctions are warranted.

#### Misrepresentation and Lack of Candor Issue

214. The issue added by Judge Sippel seeks a determination whether Kay "misrepresented facts or lacked candor in presenting a Motion to Enlarge, Change, Or Delete Issues that was filed by Kay on January 12, 1995 and January 25, 1995." As previously documented Judge Sippel's action stemmed from Judge Frysiak's erroneous conclusion that Sobel intentionally concealed the Management Agreement until compelled to disclose it in July 1996, pursuant to a letter of inquiry. It is concluded that the issue, contrived by the Bureau, is without substance. The issue is resolved in favor of Kay.

215. The issue concerns a brief statement made in a 16 page pleading filed in January 1995, that Kay had no "interest" in Sobel's stations or licenses. The Bureau contends that the statement was intended to deceive the Commission about his business arrangement with Sobel. The Bureau's argument rests on the false premise that Sobel and Kay concealed their Management Agreement until Sobel responded to a letter of inquiry in July 1996. The Bureau's contention is baseless. Initially, as discussed in the Findings, the statement was intended to correct an error in the original HDO that Kay was conducting business under a number of names including Marc Sobel dba Airwave Communications. The HDO did not state that the Commission was inquiring into the relationship between Sobel and Kay, but rather its erroneous belief that Sobel was a fictitious name being used by Kay. The statement in issue must be fairly understood in that context.

216. Moreover, the record makes clear that Kay understood the language in the statement prepared by his counsel denying an interest in Sobel's licenses or stations to mean that Kay "had no ownership interest as in owning a part of this, being a partner, in any licenses that were issued to Marc Sobel." Tr. 2444. Kay did not consider his provision of equipment and services in connection with a managed station to give him an interest in that station license, any more than he considers his provision of equipment and services to a community repeater to give him an interest in the licenses held by the users of the community repeater. Tr. 937-939. Kay's testimony as to what he meant by the word "interest" and the phrase "stations or licenses" is entirely reasonable and credible. Significantly, the Bureau shared the same view when in March 1996, it, like Kay earlier, sought to sever the Sobel licenses from the Kay proceeding, although it was aware that "Kay manages stations which are authorized to Marc Sobel." See "Wireless Telecommunication's Bureau's Request For Certification" filed March 6, 1996, note 2.

217. Further, the actions of Sobel and Kay are inconsistent with an intent on their part to conceal the management agreement from the Commission. The Bureau's speculation can not be reconciled with the fact that only two months after the January 1995 pleading, in March 1995, long before the Bureau first raised questions about the Management Agreement and the January 1995 pleading, Kay produced copies of agreements for stations he managed, including the Sobel Management Agreement. Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents (March 24, 1995). Bereft of its false premise that the Agreement was first filed in July 1996, the Bureau now speculates that Kay would not have produced the Sobel Management Agreement if the January 1995 pleading had been successful. The facts, however, do not support this speculation. The Bureau ignores the fact that Kay managed other stations besides Sobel's. In the March 1995 discovery response, in addition to the Sobel Management Agreement, Kay produced other management agreements that had no relevance to the January 1995 pleading and were not expressly implicated in the HDO. For example, it was by virtue of this discovery production that the Bureau received a copy of the management agreement between Kay and Jerry Gales. Bureau Ex. 326.

218. The sine qua non of disqualifying misrepresentation or lack of candor is a fraudulent or deceptive intent. Leflore Broadcasting v. FCC, 636 F.2d 454, 461 (D.C. Cir. 1980); Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1196, 59 Rad Reg.

2d (P&F) 801 (1986); Fox River Broadcasting, Inc., 93 FCC 2d 127, 129, 53 Rd. Reg. 2d (P&F) 44 (1983). The Bureau has not offered even a shred of evidence that Kay and Sobel intended to deceive the Commission about their management agreement. On the contrary, the record shows that Kay and Sobel have been open and straightforward with the Commission. The misrepresentation issue is resolved in favor of Kay.

#### Automatic Cancellation Issue

219. The HDO also calls for a determination as to whether any of Kay's licenses have automatically cancelled as a result of certain rule violations (issue h).

220. The Bureau lists a number of UHF repeaters which Kay has admitted are not in operation. WTB PF&C at ¶ 107. However, Kay notes it is not the entire station authorized under the call sign that is not in operation, but only certain parts thereof. As noted by Kay, a single authorization may, in addition to one or more base station locations, also authorize control stations, mobile and talk-around authority, etc. Further, in reviewing the list set forth by the Bureau in paragraph 107 of its proposed findings, the vast majority of the locations listed are designated as Signal Hill. In April 1994, he points out that he submitted an application to modify a large number of his UHF authorizations, and part of that proposal was to delete all the base stations authorized at Signal Hill. That application is still pending before the Bureau to this day, more than five years later. See Kay Ex. 65; Tr. 2383-2394. Of the remaining listed locations, Kay asserts that reference to the authorizations themselves will reveal that the vast majority of these are control stations, not base stations. As such, according to Kay, they are not subject to construction deadlines, and the maintenance of that particular portion of an authorization does not have any preclusive effect on other licensees and applicants. Kay also states that most if not all of these items would be deleted if long-pending modification applications are granted.<sup>50</sup>

221. Similarly, the Bureau lists a number of 800 MHz stations which Kay has admitted are not in operation. WTB PF&C at ¶ 108. Kay claims that reference to the authorizations in question will reveal that each of these is a secondary base station site. Kay points out that at 800 MHz, a licensee may be authorized for both primary and secondary locations on the same authorization. While primary sites are subject to applicable construction deadlines, secondary sites are not subject to construction deadlines and are not protected from interference.<sup>51</sup> Thus, as Kay indicates, automatic cancellation of authority for a secondary site would have no significant regulatory effect as a practical matter, because the site could be added back to the authorization at any time, subject to the restrictions applicable to all secondary sites.

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<sup>50</sup>According to Kay, in many, if not most, of these instances, the situations exist only because the Bureau is maintaining a five year old freeze on the processing of any of Kay's applications.

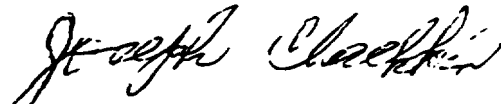
<sup>51</sup> See, e.g., Sharon Mutter, 4 FCC Rcd 2654 at n. 18 & n.19 (PRB 1989); Environmental Exploration Corp., 4 FCC Rcd 2651 at n 16 n. 17 (PRB 1989).

222. The Bureau has suggested that "[t]he Presiding Judge may simply wish to conclude [certain] base stations were either not constructed or [permanently] discontinued operation ... and direct the Commission licensing staff to perform the appropriate licensing maintenance." WTB PF&C at n. 23. This appears to be consistent with Kay's offer "to cooperate with the Bureau, after the hearing, to determine which authorizations, if any, should be purged from the Commission's database as a result of this stipulation." Kay PF&C at n. 27. The parties seem to be in agreement, therefore, that this is an administrative housekeeping chore that can be better accomplished on an informal basis in a post-hearing context. However, in light of the significant questions raised by Kay, it is imperative that the Bureau staff coordinate this matter with Kay, i.e., this should be a joint and cooperative determination, not a unilateral determination of the Bureau staff. The Commission staff, of course, will ultimately make the determination and act accordingly, but it would be an inefficient use of public and private resources to have the Bureau act unilaterally only to have Kay then seek reconsideration of one or more of its determinations and action. Therefore, the Bureau is directed to coordinate this matter with Kay before cancelling any of Kay's authorizations. In addition, in light of the determination, below, that Kay is qualified to remain a licensee, it is time to lift the five year old freeze on the processing of Kay's applications and the Bureau is directed to do so expeditiously.

223. Finally, all issues having been resolved in favor of Kay, it is ultimately concluded that Kay is qualified to remain a licensee. Further, there is no basis for license revocation of any of his stations or imposition of a forfeiture.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,<sup>52</sup> the licenses of James A. Kay, Jr., holder of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California, area ARE NOT REVOKED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph Chachkin  
Administrative Law Judge

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<sup>52</sup> In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

### **CERTIFICATE OF SERVICE**

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 29th day of November, 1999, I caused copies of the foregoing pleading to be sent by first class United States mail, postage pre-paid, to the officials and parties in WT Docket No. 97-56, as follows:

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A handwritten signature in cursive script, reading "Robert J. Keller", written over a horizontal line.

Robert J. Keller